

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

RECEIVED

SEP 10 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
 Access Charge Reform) CC Docket No. 96-262

**OPPOSITION OF LBC COMMUNICATIONS, INC. TO
 PETITION FOR STAY PENDING JUDICIAL REVIEW**

LBC Communications, Inc. ("LBC"), hereby opposes the petition of U S WEST, Inc. ("USW"), filed July 23, 1997 (the "Petition"), for stay of the Access Charge Reform Order.¹ In its Petition, USW asks that the Commission stay the Access Charge Reform Order insofar as it prohibits incumbent local exchange carriers ("ILECs") from assessing the per-minute residual transport interconnection charge ("Residual TIC") on switched interconnection services used by competitive access providers ("CAPs") that do not use the ILEC's local transport services. For the reasons set forth below, LBC opposes USW's Petition.

DISCUSSION

As USW concedes in its Petition, proponents of a stay must demonstrate (1) that they are likely to prevail on the merits, (2) that they will suffer irreparable harm if a stay is not granted, (3) that other interested parties will not be harmed if a stay is granted, and (4) that the public interest favors the grant of a stay.² In this case, USW has failed to satisfy even one, much less all four, of this four-prong test.

I. USW Is Unlikely To Succeed On The Merits.

USW's case on the merits is wholly premised on a policy disagreement that it has with the Commission; it does not raise any substantial legal issues. USW argues that the Residual TIC in fact is primarily an implicit universal service support mechanism and that the Commission's decision to prohibit ILECs from recovering

¹ In the Matter of Access Charge Reform, CC Docket No. 96-262 (rel. May 16, 1997) (the "Access Reform Order").

² See Virginia Petroleum Jobbers Ass'n v. PC, 259 F.2d 921 (D.C. Cir. 1958); Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977).

the Residual TIC “arbitrarily discriminates against [USW] in favor of its transport competitors.”³ In addition, USW argues that the prohibition will violate Section 254(b)(4) of the Communications Act, which requires that universal support mechanisms be “sufficient and predictable.” Neither contention has merit.

A. USW’s Objection To The Residual TIC Rule Amounts To Little More Than A Policy Disagreement With The Commission.

USW does not take issue with the basic structure of the Commission’s effort to reform the TIC (*i.e.*, shifting the identifiable service-related costs in the TIC to other rate elements). Instead, USW complains that because the remaining costs in the TIC “need to be recovered,” it was arbitrary for the Commission to decide that they should not be recovered from CAPs that do not use ILEC transport services.⁴

To the contrary, it was entirely rational for the Commission to exempt competitive providers of transport that would not use ILEC services from paying part of the costs of ILEC transport. As the Commission recognized in the Access Reform Order, ILECs recover some of their local transport costs through the TIC.⁵ If the Commission were to permit ILECs to impose these charges on traffic that does not use the ILEC’s local transport services, it would be sanctioning an implicit subsidy of the ILEC by its competitors.

Indeed, whether or not the Residual TIC costs are “legitimate costs” has nothing to do with who should pay those costs and, contrary to USW’s claim, the Commission has not concluded that “implicit tandem switch and universal service support ... should continue to be recovered” through the Residual TIC.⁶ Rather, the Commission merely has determined that market forces will most effectively regulate transport costs and, to that end, has limited the ability of ILECs to impose charges on their competitors for services that the competitors do not use. Far from “discriminatory,” the scheme should result in a fair allocation of costs and an equal opportunity for new entrants to compete. This policy may not be particularly palatable to USW, but it certainly does not form a basis to overturn the Commission’s Residual TIC rule.

³ Petition at 8.

⁴ See id. at 10.

⁵ Access Reform Order ¶ 212.

⁶ Petition at 14-15.

B. The Commission's Rule Prohibiting ILECs From Assessing Residual TIC Costs On CAPs That Do Not Use ILEC Transport Services Does Not Violate Section 254(b)(5) Of The Act.

USW's claim that it is entitled to recover the costs of rural transport through its Residual TIC is unfounded as a matter of law. Rural local transport does not receive universal service support. Instead, universal service historically has been applied to the costs of local loops in rural areas.⁷ Thus, the Commission's Residual TIC rule does not eliminate an implicit universal service support subsidy or otherwise undermine the Commission's proposed universal service support systems.

Indeed, as the Commission itself suggested, ILECs such as USW may recover rural transport service as they would in a competitive market — by deaveraging their transport rates.⁸ Presumably, in high cost areas, fewer CAPs will be competing and the ILECs will have greater flexibility to charge cost-based transport rates. In high-density areas, ILECs will be subject to the same market pressures as their competitors. Thus, this is not a matter of universal service support or of discrimination between carriers, but simply of bringing competition to a market that has been too long dominated by monopoly pricing.

II. USW Will Suffer No Irreparable Injury Absent A Stay.

A "concrete showing of irreparable harm is an essential factor in any request for a stay."⁹ In this case, USW has failed to make such a showing. USW alleges that it will suffer irreparable harm in the absence of a stay because its customers will "shift much, if not all, of their traffic away from U S West's local transport in order to reap the benefit of the RTIC exemption."¹⁰ However, as the courts and the Commission have made abundantly clear, economic loss, including the loss of customers to competition, does not constitute "irreparable harm" for purposes of the Virginia Petroleum Jobbers test.¹¹

⁷ See 47 C.F.R. § 36.601 *et seq.*

⁸ See Access Reform Order ¶ 227.

⁹ In re Local Competition Provisions of the Telecommunications Act of 1996, 11 FCC Rcd at 11755 (citations and quotations omitted).

¹⁰ Petition at 10.

¹¹ See In re Local Competition Provisions of the Telecommunications Act of 1996, 11 FCC Rcd at 11756 (citing Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)).

In any event, although application of the rule will result in increased competition for access services and possibly cost USW some customers, the claim that application of the rule will cause most or all of USW's transport customers to shift their business to other providers is greatly overstated. Indeed, USW is not required to assess TIC charges and could therefore price its services competitively, if it so desired, while petitions for review of the Access Reform order are pending.

III. Competitive Access Providers will Suffer Substantial Harm If A Stay Is Granted.

USW alleges that grant of a stay will cause little or no harm to other parties. The only basis for this claim, however, is USW's unfounded conclusion that the "so-called competition" that will result from the Commission's decision to prohibit ILECs from charging CAPs for transport services that they do not use "cannot be sustained" and its fear that the Residual TIC rule will create "false economic incentives in the marketplace that cause harm to parties who rely on them."¹² Indeed, USW cites LBC as an example of an entity that will be harmed by the Residual TIC rule.

To the contrary, rather than creating "false economic incentives," LBC views the Residual TIC exemption as an opportunity for it and other CAPs to compete in this market without being required to subsidize the dominant, monopoly ILECs. If the Commission were to grant USW's Petition and allow USW to subsidize its switched access services by assessing a Residual TIC on CAP transport services, it will slow the development of competition and derail the efforts of new competitors to enter the market.

IV. A Stay Would Not Serve The Public Interest.

Finally, USW has failed entirely to demonstrate that the proposed stay would advance the public interest reason. Instead, USW merely reiterates its principle argument on the merits, *i.e.*, that the Residual TIC rule will supposedly lead to distortions in the marketplace. USW does not, however, address whether or not there is a public interest need for a stay of the rule pending review.

In fact, grant of USW's stay request would be contrary to the public interest. If granted, a stay would shelter USW and the other ILECs from a fully competitive

¹² Petition at 14.

access market while the ILECs tie the Commission up with, potentially, years of litigation. The consequent impediment to competition will hamstring the competitive access industry and, by extension, prevent the public in general from enjoying the fruits of competition.

CONCLUSION

For all of the foregoing reasons, USW has failed to satisfy even one, much less all four, of the factors from Virginia Petroleum Jobbers Ass'n v. FPC, and its petition for stay pending appeal should be denied.

Respectfully submitted,

LBC COMMUNICATIONS, INC.



/s/ W. Kenneth Ferree

W. Kenneth Ferree

GOLDBERG, GODLES, WIENER & WRIGHT
1229 Nineteenth Street, NW
Washington, DC 20036
(202) 429-4900

Its Attorneys

September 10, 1997

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Opposition of LBC Communications, Inc. to Petition for Stay Pending Judicial Review was sent by first-class mail, postage prepaid, this 10th day of September, 1997, to each of the following:

Robert B. McKenna
Jeffrey A. Brueggeman
Suite 700
1020 19th Street, N.W.
Washington, DC 20036

/s/ Hema Patel *Hema Patel*
Hema Patel